IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

FIRST APPEAL NO. 897 OF 1990

1) Smt. Anjanaben Hasmukhchandra)
Shah, Widow, aged 36 years,)
2) Smt. Pushpaben Somchand Shah,)
Mother, aged 65 years,)
3) Master Dharmesh Hasmukhchandra)
Shah, Son, Aged 13 years,)
4) Miss Dipti Hasmukhchandra)
Shah, daughter, Aged 11 years)
5) Master Shekhar Hasmukhchandra)
Shah, Aged 8 years.)
Appellants Nos.3 to 5 being)
minors, through their mother)
and next friend)
Smt. Anjanaben H. Shah,)
All residing at 9, Shakti)
Nagar, Sardar Patel Road,).. Appellants.
Borivli (W), Bombay-400 092.)..(Orig.Applicants)

Versus

Shri Bholanath Pannalal Jain)
since deceased, through his)

legal heirs & representatives:)
1A) Mrs. Shakuntaladevi)
Bholanath Jain;)
1B) Dalchand Bholanath Jain,)
R.No.1A & 1B residing at)
Shakuntala Niwas, Mahatma)
Gandhi Road, Borivli (East),)
Bombay - 400 066.)
1C) Mrs. Damayanti Premchand)
Jain, Block No.4, 1st Floor,)
Building No.2, Sadichha,)
Sardar Patel Road, Borivli)
(W), Bombay - 400 092.)
2) Shri Labhsingh S/o.)
Karnamsingh, resident of)
No.9, Shantaram Chawl, At)
& Post Vajreshwari, Taluka)
Bhiwandi, Dist. Thane.)
3) The United India Insurance)
Co. Ltd., D.O. No.8, Union)
Co-op. Ins. Building, 5th)
Floor, Sir. P. M. Road,)
Fort, Bombay - 400 001.)
4) The Oriental Insurance Co.)
Ltd., Divisional Office No.7)

Magnet House, N. Morarji).. Respondents.
Road, Bombay - 400 038....)..(Orig.Opponents)

Mr. J.K.Mistri with Mr. V.V.Khemkha with Mr. S.R.Kudroli for the Appellants.

Shri J. P. Dubey for Respondent Nos.1A to 1C, 2 & 3.

Mr. Lokesh with Mr. G. S. Hegde for Respondent No.4.

CORAM : ANOOP V. MOHTA, J.

DATED : 8TH DECEMBER, 2005.

J U D G E M E N T:

This is a first appeal filed by the appellants as their Claim Application No.17 of 1984 filed before the Motor Accident Claims Tribunal, Pune (Tribunal) for compensation under Section 110 of the Motor Vehicles Act, 1939, (Motor Act) was rejected in toto.

2. On 18th November, 1983 (the deceased), Hasmukhchandra Somchand Shah, was travelling in a Car No. MRX - 5840 from Pune to Satara on Bombay - Bangalore N. H. Road. When the said car reached near Kikvi village at about 9.00 P.M., the driver required to turn the car to the left side to avoid accident due to heavy flood light from the oncoming vehicles and in that process dashed into a stationed truck - tanker bearing No. MTT - 8032, owned by

Labhsingh, respondent No.2, which was parked on the left side of the road but in reverse direction and without any light or signals. The deceased received serious injuries. He was removed to the Sasson Hospital, Pune, where he was succumbed to the injuries and declared dead. An application No. 17 of 1984 was filed before the Tribunal, Pune in the year 1984, which was resisted by the New India Assurance Company Limited by its reply dated 12th December, 1984 as the vehicle was insured with Oriental Insurance Company Limited (respondent No.4). The United India Insurance Company Limited, respondent No.3, with whom Fiat Car MRX 5840 owned by Bholanath (since deceased), respondent No.1, was injured. They resisted the claim by a written statement dated 14th September, 1984 and denied the incident as well as, the claims. They alternatively submitted their liability only to the extent of Rs.15,000/- as per the terms and conditions of the policy.

3. As the tanker was insured with the Oriental Insurance Company Limited /respondent No.4, by a written statement (Exh. 28) they resisted the claim and admitted their liability, if any, to the extent of Rs.1,50,000/- only in respect of third party personal

injury. They resisted the claim on the ground that the driver of the car was negligent as the car dashed to the stationed tanker. They further submitted that there were enough street light, apart from the parking light of the tanker. The averments against the driver remained uncontested by the respondents. No evidence was led by the opponents / respondents in support of their objections and/or the written statements. The appellants / claimants led evidence in support of their claims.

4. Appellant No.1, Anjanaben, wife of the deceased led evidence in support of the claims. It was further supported by the Pushpaben the mother of the deceased, PW-2. The deceased was travelling in the said car along with his mother Pushpaben, relatives and friends. Being appellant and also an eye witness, she (PW-2) has supported the case of the applicants that at the relevant time there was no parking signal or any such indicator to the parked tanker. The driver could not see the stationed tanker from the distance. The driver saw the stationed tanker only after reaching near to it. Therefore, as in order to save the collusion, the driver of the car had dashed the stationed tanker. She has deposed that because of the

heavy flood lights, also the driver of the car could not see the stationed tanker from the distance. The deceased had suffered various injuries in the car itself and died because of the heavy impact of the accident. In the cross-examination she further stated that the tanker was standing in the middle of the road which was obstructing the traffic. The left side of the car dashed against the tanker. She has further deposed that the speed of the car was just higher than normal. There was nothing to shatter her in the cross-examination.

5. The Tribunal, however, by the impugned judgment and order held that the driver of the vehicle No. MTT - 8032 (Tanker) as well as driver of the vehicle No. MRX - 5840 (Fiat car) were not negligent. The Tribunal further held that the applicants failed to prove that the death of the deceased was not on account of negligent driving and therefore rejected the claim in toto.

6. Considering the above and the grounds raised in the appeal, the following questions need consideration:-

(1) Whether there was contributory

	negligence by the drivers of the vehicles involved in the accident?	YES.
(2)	Whether such contributory negligence of driver affect the claims of bonafide passengers ?	NO.
(3)	Whether the total rejection of the claims in the facts and circumstances of the case, was proper and correct ?	NO.
		YES.
(4)	Whether the appellants / applicants are entitled to the compensation as prayed in their application ?	As ordered.
		Interest
(5)	The rate of interest from the date of application ?	@ 7.5% p.a.
(6)	What Order ?	Appeal allowed.

ISSUE NOS.1 and 2 :

7. From the material, as well as, evidence led by the appellants / applicants, there is an undisputed position on the record that the Tanker was stationary in the middle of the road at the relevant time. There was no parking light or any indicator as required. The said Tanker, therefore, admittedly was stationed. This was nothing but *"leaving vehicle in a dangerous position"* as contemplated under Section 122 of the Motor Act, 1988. The term *"leaving vehicle in a dangerous position"* has been further explained in **Sheokaran and Ors. vs. Surjit Kaur & Ors.,** (1993 ACJ 652). In absence of any contrary evidence by the owner or driver and/or by the Opponents / Respondents, I am of the view that the evidence of injured witness i.e. PW-2, the mother of the deceased needs to be accepted. In such matters, the evidence of one witness is sufficient to consider the claim of the legal representatives of the deceased, **Shakuntala Gajanan Naik & Ors. vs. Tushar V. Rajadhyax Major & Ors.** (1995 (2) TAC 406 Bombay). In the present case, PW-2 had witnessed the whole incident and her evidence as narrated, remained unshattered. The opponents have therefore failed to prove contrary. There is no reason to disbelieve the case of the appellants /

applicants as stated by PW-2.

8. The driver of the car required to swirl the car to avoid collusion. The driver of the car also could not control the speed of the car at that particular moment. As the stationed Tanker was without any indicator or any parking lights and was stationed in the middle of the road, the car dashed / hit the said Tanker and resulted into the accident on 18th November, 1983 at about 9.00 P.M. There is no material brought on the record, even though pleaded by Opponents that the road lights were on and the visibility was clear and the driver, therefore, could have avoided the accident. In the absence of any material on the record, I am inclined to accept the evidence of PW-2 in support of the averments made by the appellants / applicants in their claim application.

9. PW-2 in her evidence has made positive statement that the vehicle in which they were travelling along with the deceased was moving in a higher speed than the normal. It was a dark night of 18th November, 1983. The driver should have taken care of the speed of the vehicle while driving on such road, specially

when there were no road lights as contended by the appellants / applicants themselves. The driver, in such circumstance, knowing fully the traffic of incoming vehicle with heavy flood lights and/or could have driven the vehicle in controlled speed. The controlled vehicle in such circumstances could have avoided the accident. The contribution of negligence of the driver in question, therefore, cannot be over looked. He could have in a given case, had the vehicle in controlled speed, avoided the accident. The driver / owner of the vehicle (stationed Tanker) should have parked the vehicle by keeping its signals and/or any indicator on as required, for such stationed vehicle, on such busy road.

10. The Claims Tribunal, therefore, wrong by rejecting the total claim of the appellants / applicants by observing "nobody can be blamed for this accident, either the driver of the stationed Tanker or the car. This is an act of God, i.e. viz. major for which nobody can be held responsible and liable for paying compensation". The learned Tribunal further wrong in rejecting the evidence of PW-2, the mother of the deceased, even though she had witnessed the incident being member of the passengers of the same

car. Her evidence was rejected on the ground that she was interested in getting, as much as, possible and exaggerate the story in favour of the appellants / applicants. The non-examination of the other passengers including the relatives and trustees was held adversely, against the appellants / applicants. The learned Tribunal was wrong further by observing that there was no mistake on the part of the car driver and/or the driver of the Tanker and therefore they were not negligent.

11. The Apex Court in **Municipal Corporation of Greater Bombay vs. Laxman Iyer and Anr.** (2004 ACJ 53 SC) while interpreting the term *"composite negligence"*, observed as under:

> "But in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise. Where a person is injured without any negligence on his part but as a result of combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense. It is a case of what has been styled by Pollock

as injury by composite negligence. *[See Pollock on Torts, 15th Edn., p.361].*

12. In view of this as per the Apex Court decision in Municipal Corporation of Greater Bombay **(supra)** the concept of composite negligence is different from *"contributory negligence".*

13. A Division Bench of the Panjab & Haryana High Court in **Rashmi Chhabra & Ors. vs. Vijay Kumar Ahuja & Ors.,** (1995(2) TAC 556 Punjab & Haryana), while considering the aspect of negligence and apportionment, observed that a truck parked in the middle of the road without any parking lights, indicator or any sort of precaution and matador coming from behind struck against the right portion and causes a heavy impact, the claimant deceased crushed and died on the spot. In that case both the drivers were held to be negligent in causing the accident.

14. In **Mohammed Mumtaz & Ors. vs. S. Ravindranatha & Ors.,** (2005 ACJ 1951 Karnataka), the Karnataka High Court has also considered this point and held that driver of the vehicles was composite negligent as the van driven in a fast speed during night dashed against

rear side of mini lorry parked partly on tarred and partly on mud road resulting in death of 3 persons travelling in the van.

15. The learned Tribunal has noted the submission of the United India Assurance Company Limited to the extent that there was contributory negligence, ratio of liability should be 25% to the car and 75% to the truck / tanker.

16. The respondents / opponents except bare denial, without leading any evidence, unable to support their defence. In this background, I am of the view that this is a case of contributory negligence of both the drivers / owners of the vehicles in question.

17. Taking all this into account, I am of the view that this is a case where both the drivers / owners have contributed negligence to the extent of 50% and 50% based on which I am inclined to consider the grant of compensation to the appellants / applicants.

18. There was no negligence of the passenger, the deceased. In such cases as there was no contributory negligence by the passenger. There is no question of

such contributory negligence to affect the claims of the deceased, as observed by the Apex Court in Municipal Corporation of Greater Bombay **(supra).** The negligence of the two drivers had caused the accident and that resulted into the death of the third person i.e. the deceased. The third person was injured without any negligence on his part. This is called the composite negligence. Therefore, the owners of the respective vehicles are basically jointly and severally liable to pay the compensation. However, it is subject to the terms and conditions of the insurance policy.

ISSUE NOS.3 & 4 :

19. The evidence in so far as the income of the deceased is concerned, has been reflected through the widow i.e. PW-1, applicant No.1. She has placed the unassessed income tax returns to submit that the income of the deceased was Rs.3,000/- per month. The deceased was a small business man. Though the detailed break up was not given while claiming Rs.5,00,000/- for the loss of the deceased, the learned Tribunal has treated the deceased income as Rs.1,500/- per month. The Tribunal, therefore,

further considered Rs.400/- as a personal expenses for the deceased. After deducting this amount, the Tribunal has taken Rs.1,100/- as a monthly amount for his family. The age of the deceased was on the date of incident, 42 years. The expectancy of life be treated as 65 years. Therefore taking multiplier of 15 into consideration, the learned Tribunal has assessed the amount of Rs.1,98,000.00 be taken as loss of dependency. This assessment of the claim is fair, just and reasonable, specially when claimants failed to prove any material document on record with respect to the income of the deceased as well as his age. This according to me, in the facts and circumstances of the case and as it remained unchallenged, is just and fair compensation.

20. Applicant No.1 being widow has lost her husband. The principles of grant of amount for loss of consortium is settled. The amount as awarded by the learned Tribunal Rs.10,000/- towards this end. The four applicants being mother and son and daughter of the deceased have definitely lost the love and affection of the deceased. The Tribunal, therefore, rightly assessed Rs.20,000/- total amount for this point. Hence, the compensation of Rs.1,98,000/- plus

Rs.10,000/- towards loss of consortium, plus Rs.20,000/- towards love and affection and the total comes to Rs.2,28,000/-. If there is a case of uncertainty then there is a chance of further income and or higher income also. I am not inclined to reduce and/or increase this amount any further on this count. In the fact and circumstances of the case, as the formula of multiplier is applied, no such further deduction is necessary.

21. In view of the Supreme Court judgment in **T. N. State Transport Corporation Ltd. vs. S. Rajapriya & others., (**(2005) (6) SCC 236) I am granting the interest at the rate of 7.5% p.a. on the amount of Rs.2,28,000/- from the date of application till whole amount is paid.

ISSUE NO. 5 :

22. In view of the above, the First Appeal is allowed and the respondent Nos.1,2 and 4 are jointly and severally ordered and decreed to make payment to the applicants as under:

Rs.1,98,000.00	Towards compensation.

Rs. 10,000.00	Towards Consortium.
Rs. 20,000.00	Towards Love & Affection.
Rs.2,28,000.00	Total payable.

This amount of Rs.2,28,000.00 will carry interest at the rate of 7.5% per annum from the date of application till amount is paid. Accordingly, out of the said total sum of Rs.2,28,000/-, respondent No.3 will be liable to pay to the appellants a sum of Rs.15,000/- (Rupees Fifteen thousand) and the interest. Respondent No.4 will be liable to pay to the appellants a sum of Rs.1,50,000/- (Rupees One Lakh fifty thousand) and the interest. Respondent Nos.1A to AC and 2 (owners of the vehicle in question) will be liable to pay balance i.e. Rs.63,000/- (Sixty Three thousand) and interest to be shared equally.

(a) The appeal is allowed in aforesaid terms.

(b) In the circumstances of the case, there shall be no order as to costs.

Sd/-

(ANOOP V. MOHTA, J.)